... the question 'contract of service or no?' is inevitably a mixed question of law and fact. The question of whether it is a matter primarily of law or fact has been considered before. Indeed as far back as the days of the Workmen's Compensation Act 1906 one finds in *Simmons* v *Heath Laundry Co* [1910] 1 KB 543 that Cozens-Hardy MR, in relation to this very issue which the minister had to decide in the present case, said at p 548:

'In such a case there may be a contract for services, but there is not a contract of service. In any particular case it will be for the arbitrator, after considering all the circumstances, to decide whether the injured professional person is or is not a 'workman'. This is not a question of law, but a question of fact ...'

That is echoed in the same case by Buckley LJ who said, at p 553:

'The question in this case then resolves itself into this: Was there such evidence before the learned judge as that he upon those principles could and did find as a matter of fact that this girl in giving lessons upon the pianoforte was contracting to use her skill to achieve the result of instructing the child in playing the piano, or was she placing herself in the position of owing the duty of obeying the mother's orders as to how she should give her lessons?'

Buckley LJ treated it as a matter of fact.

Encik Cecil Abraham urged me to reject the questions and dismiss the appeal. With respect, I prefer to take the approach taken by Diplock J (as he then was) in *Terrar* v *Minister of Pensions and National Insurance* [2] (unreported but referred to at p 281 of Lord Widgery's judgment in *Global Plant* [1] thus):

But Diplock J in *Terrar* v *Minister of Pensions and National Insurance* (unreported, 13 July 1960) goes very much further. Dealing with the same problem, when speaking of a determination made by the Minister in that case, he said:

'In order to set aside that determination, limited as I am to setting aside determinations which are erroneous in law, Mr Turner-Samuels must satisfy me either that there was no evidence upon which the Minister could reach the decision that he did that the appellant was an independent contractor – and I do not think Mr Turner-Samuels contends that there was no evidence of that; if he does so contend, I certainly do not accept that contention – or, alternatively, it seems to me that he must fall back upon the principle which is applied from time to time by the appellate courts when they dislike the opinion of the tribunal of fact. That is set out perhaps most clearly in *Edwards* v *Bairstow* [1956] AC 14. Either one can reach the same result by talking about primary facts and secondary facts – and by that I mean inferences from primary facts – on which the appellate court is entitled to intervene, or else one can do it rather more simply, as appears in Lord Radcliffe's speech where he said, at p 36: 'If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal ....'

Lord Widgery went on to state that in his judgment that was the proper approach for him to take in *Global Plant*.[1] What he did was to first of all examine the decision appealed against to see whether it contained any false proposition of law ex facie. Next, he considers whether the decision reached was supported by no evidence (in which event of course the decision would be wrong in law). Finally, he considered whether the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the decisions arrived at.

It is not, as I see it (said Lord Widgery at p 282), for me to balance again the arguments pro and con the decision which the minister has reached, giving the separate factors the weight which I think they should or should not have. That balancing operation is a matter for the minister. All that I have to ask myself is whether the conclusion which he has reached is one that no person acting judicially and properly instructed as to the relevant law could have come to in this determination.

Applying those tests to the instant case, it is my judgment that the chairman's award is not open to attack in any one of the above grounds. The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *P Kuppusamy & Co*; *Shearn Delamore & Co.*

Reported by *Ng Sheau Jiuan*

Malaysia Building Society Bhd v Lim Kheng Kim & Ors

HIGH COURT (PENANG) – CIVIL SUIT NO 23-30-86
EDGAR JOSEPH JR J
8 JULY 1988

Civil Procedure – Judgment in default of appearance – Setting aside – Principles applicable – Laches – Bona fides – Interest on judgment debts – Independent covenant to pay interest – Doctrine of merger – Value of land – Reliance on common and public knowledge by court – Rules of the High Court 1980, O 42 r 12

Contract – Guarantee – Surety liable as principal debtor as well – Notice of demand – Service – Indulgence given to principal debtor – Security in the form of land available – Whether action against surety premature – Misrepresentation – Whether guarantee void

The first defendant along with the other defendants had signed a joint and several guarantee in favour of the plaintiff in consideration of the plaintiff granting a loan to an incorporated company ('the borrower'). The loan was secured by a charge over the borrower's land. Eventually, the plaintiff commenced legal proceedings against the defendants in their capacity as sureties for the recovery of the debt. Although served with the writ of summons and statement of claim, the first defendant did not enter an appearance and so, on 18 March 1986, the plaintiff obtained judgment in default of appearance against him. On 7 November 1986, the first defendant was personally served with a bankruptcy notice and a copy of the default judgment. On 23

January 1987, his solicitors wrote stating that they had instructions to accept service of the creditor's petition. On 13 August 1987, when the bankruptcy petition came on for hearing counsel for the first defendant informed the court that an application to set aside the default judgment would be filed but it was only on 9 February 1988 that the first defendant applied to have the judgment set aside on the grounds: (a) that the judgment was not regularly obtained in that the plaintiff had entered judgment for a sum in excess of that which was lawfully due to the plaintiff; and (b) that in the alternative, if the judgment was regularly obtained, he had a good defence on the merits.

As regards ground (a), it was contended that it was not legally permissible for the plaintiff to obtain judgment for interest at the rate of 14% pa for the post-judgment period, regard being had to the provisions of O 42 r 12 of the Rules of the High Court 1980 in existence at the material time which provided for interest at the rate of 8% pa on judgment debts.

As regards ground (b), it was contended that (i) the plaintiff's claim was premature in law; (ii) the plaintiff's claim was misconceived, frivolous and an abuse of the process of the court; (iii) the plaintiff's claim for interest was misconceived in law; and (iv) the guarantee was void and of no effect in that the first defendant had been induced to execute the same by misrepresentation on the part of the plaintiff that, notwithstanding the terms of the guarantee, the plaintiff would only have recourse to the first defendant if, but only if, the plaintiff had to recover from the borrower the amounts outstanding following enforcement of the charge. It was contended that the plaintiff's suit was premature in law because it had not been proved that service of a notice of demand dated 31 January 1985 had been effected on the first defendant; alternatively, that the notice of demand was null and void, having regard to a letter dated 19 February 1985 to the borrower's solicitors granting an indulgence to the borrower. The notice of demand was apparently received at the address for service of the first defendant given in the guarantee by someone on behalf of a company known as Material Handling and Engineering Sdn Bhd. It was also contended by the first defendant that a second notice of demand dated 29 October 1985 addressed to him was also bad because instead of giving a seven-day notice of demand to the borrower before giving a notice of demand to the first defendant, the plaintiff's solicitors had sent the second notice of demand to the borrower and all the defendants on the same day. It was also argued that the plaintiff's letter of indulgence of 19 February 1985 to the borrower's solicitors stating that the period of the loan was extended until 30 November 1985 contradicted the plaintiff's subsequent letter of 15 March 1985 stating that unless the instalment payments for principal and interest were paid by 31 March 1985, action would be taken to recover the loan and interest. The first defendant also contended that as the plaintiff had obtained an order for sale of the borrower's land and the sale was pending, the present suit was a useless piece of litigation as the value of the land exceeded the judgment sum.

Held, dismissing the application: (1) The covenant for the payment of interest was not merely ancillary but was an independent covenant and was not extinguished in the judgment, the doctrine of merger being inapplicable. The plaintiff was therefore entitled to obtain judgment for interest at the contractual rate in respect of the post-judgment period. The plaintiff had therefore not obtained judgment in excess of that which was lawfully due.

(2) The notice of demand had been properly served in accordance with the provision of the guarantee regarding the mode of service of notices and demands.

(3) The first notice of demand to the first defendant had not been nullified by the plaintiff's letter of 19 February 1985 to the borrower granting the borrower an indulgence.

(4) There was no contradiction between the plaintiff's letter of indulgence dated 19 February 1985 stating that the period of the loan was extended until 30 November 1985 and the plaintiff's letter of 15 March 1985 stating that unless the instalment payments were paid by 31 March 1985, action would be taken to recover the loan and interest. In the final paragraph to the letter of indulgence, it was stated categorically that the plaintiff had the right to recall the loan if at any one time the borrower defaulted in the terms of repayment.

(5) The second notice of demand was not issued prematurely as the first defendant was liable as a principal debtor and not merely as a surety so that once the borrower was in default, the plaintiff could enforce the guarantee. The giving of seven days' notice to the borrower before the bringing of proceedings against the guarantor, assuming there was such a requirement, was mere surplusage and so was of no consequence.

(6) The provisions of the guarantee as a whole were such that the plaintiff was not bound or required in law to realize the security before enforcing the guarantee. Moreover, with regard to the value of the land, market conditions justified the plaintiff's action in proceeding against the defendants. In this connection, a judge is entitled to rely on what is common and public knowledge when considering the rise or fall in the value of land.

(7) In considering an application to set aside a default judgment regularly obtained, the court can quite properly take into account the conduct of the defendant apart from the question of merits. In this case, the first defendant's conduct in attempting to negotiate a settlement with the directors of the plaintiff and that too after receiving a bankruptcy notice did nothing to help his defence that he had been induced by misrepresentation by the plaintiff to sign the guarantee. Moreover, the first defendant had been guilty of laches and his conduct had not been bona fide.

Cases referred to

1 *MBF Finance Bhd* v *Malaysia Air Charter Co Sdn Bhd & Ors* [1987] 2 MLJ 718 (not folld)
2 *American International Assurance Co Ltd* v *Union Builders (M) Sdn Bhd* [1973] 1 MLJ 95 (folld)
3 *Malaysian International Merchant Bankers Bhd* v *Dhanoa Sdn Bhd* [1988] 1 MLJ 257 (folld)
4 *Popple* v *Sylvester* (1883) 22 Ch D 98 (folld)
5 *Sneyd, ex p Fewings, Re* (1884) 25 Ch D 338 (CA) (folld)
6 *London Borough of Ealing* v *El Isaac & Anor* [1980] 2 All ER 548 (folld)
7 *Lowry* v *Williams* [1895] 1 IR 274 (CA) (folld)
8 *Evans* v *Bartlam* [1937] AC 473 (folld)
9 *Barclays Bank Ltd* v *IRC* [1961] AC 509 (folld)
10 *Ng Yik Seng & Anor* v *Perwira Habib Bank Malaysia Bhd* [1980] 2 MLJ 83 (distd)
11 *Datuk Jagindar Singh & Ors* v *Tara Rajaratnam* [1986] 1 MLJ 105 (folld)
12 *Bank Bumiputra Malaysia Bhd* v *Esah bte Abdul Ghani* [1986] 1 MLJ 16 (folld)
13 *Atwood* v *Chichester* (1877-78) 3 QBD 722 (folld)
14 *Ban Huat Seng Co Ltd* v *Lee Poh Soo* [1967] 1 MLJ 145 (folld)

Legislation referred to

National Land Code 1965 ss 256(2), 257(1)(a)
Rules of the High Court 1980 O 42 r 12

NG Sivanandan (*Miss Karin Lim Ai Ching* with him) for the plaintiff.

Ooi Teik Hoe for the first defendant.

Cur Adv Vult

Edgar Joseph Jr J: Datuk Lim Kheng Kim, the first defendant herein, seeks to set aside a default judgment dated 18 March 1986 entered against him for the recovery of $1,243,859.44 with interest thereon at the rate of 14% pa from 1 October 1985 to date of realization and costs.

It appears from the statement of claim herein that the first defendant, along with the second, third and fourth defendants, had executed a joint and several guarantee, whereby in consideration of the plaintiff making or affording loan facilities to an incorporated company ('the borrower'), they had agreed that if the borrower shall in any respect fail to perform any of its obligations, then the defendants as guarantors shall indemnify the plaintiff, the sum of $1,500,000 together with interest, costs, charges and all sums payable by the borrower to the plaintiff.

Other provisions of the joint and several guarantee material to this application were as follows.

Paragraph (c) of the preamble provides:

> The borrowers have applied to the society for a loan of ringgit one million and five hundred thousand ($1,500,000) only (hereinafter referred to as 'the said loan') for the purpose of financing the development of the said estate and at the request of the guarantors the society has agreed to grant to the borrowers the said loan upon the security of a first legal charge of even date executed by the borrowers over the said lands in favour of the society (hereinafter referred to as 'the said charge').

Clause 1 provides:

> In consideration of the society having at the request of the guarantors agreed to make the said loan of ringgit one million and five hundred thousand ($1,500,000) only to the borrowers the guarantors hereby guarantee jointly and severally as principal debtors and not merely as sureties to the society the repayment by the borrowers of the said loan together with interest costs charges and all other sums payable by the borrowers to the society under or pursuant to the said charge and the due performance and observance of all the agreements covenants and undertaking on the part of the borrowers therein contained.

Clause 3 provides:

> It is hereby agreed and declared that in the event that the borrowers shall:
>
> (i) make default in payment of any one or more of the instalments or any part thereof or any interest thereon or other sums of moneys payable under the said charge; or
> (ii) fail to make payment of the balance of the moneys owing to the society after the expiry of the notice of demand provided under the said charge; or
> (iii) be wound up whether compulsorily or voluntarily; or
> (iv) in any respect fail to observe or perform any of the agreements covenants terms and conditions thereof contained in the said charge or shall commit any breach of its covenants or obligations thereunder
>
> then and in any of such case the society shall have the right to enforce this guarantee against the guarantors, for the whole amount of the outstanding loan inclusive of all interests costs expenses and charges whether legal costs or other costs incurred in the realization of the security/securities under the said charge. The society shall not be bound or required to proceed against the security first before enforcing this guarantee against the guarantor.

Clause 4 provides:

> Any admission or acknowledgment in writing by the borrowers or any person on behalf of the borrowers of the amount of the indebtedness of the borrowers or otherwise in relation to the subject matter of this guarantee or any judgment or award obtained by the society against the borrowers or proof by the society in winding-up which is admitted, or any statement of account by the society certified correct under the hand of any one of the managers or any duly authorized officer of the society shall be binding and conclusive evidence against the guarantors of amount for the time being due to the society from the borrowers.

Clause 5 provides:

> This guarantee shall be in addition to and shall not be in any way prejudiced or affected by any collateral or other security now or hereafter held by the society for all or any part of the moneys hereby guaranteed nor shall such collateral or other security or lien to which the society may be otherwise entitled on the liability of any person or persons or corporation not parties hereto for all or any part of moneys hereby secured be in any way prejudiced or affected by this guarantee.

Clause 12 provides:

> In the event of the society exercising its right of sale of the said lands or assigning its rights under the charge then and in any such event should the proceeds of such sale or assignment after deducting all the expenses thereof and incidental thereto (hereinafter called 'the net proceeds') be insufficient to pay all moneys due and owing to the society by the borrowers, the guarantors shall, upon demand in writing by the society, forthwith pay to the society a sum representing the difference between the net proceeds and the moneys then due and owing to the society.

Clause 13 provides:

> Without prejudice to any right of guarantors against the borrowers as principal debtors, the guarantors as between themselves and the society shall be deemed to be principal debtors and not merely as sureties and accordingly the guarantors shall not be discharged nor shall their liability be effected by any act, thing, omission or means whatever whereby their liability would have been discharged if they had not been principal debtors and in particular (but not by way of limitation) the society shall have the fullest liberty without effecting this guarantee to postpone for any time or from time to time the exercise of any of the powers conferred by the charge in the event of the borrowers committing any default in complying with any of the terms and conditions herein contained forbear to enforce the covenants for the payment of principal or interest or any other money or any other covenants agreements conditions or stipulations con-

tained or implied in the charge or any other remedies or securities available to the society, and the guarantors shall not be released by any exercise by the society of its liberty with reference to the matters aforesaid or any one of them or by time being given to the borrowers or its successors in title or by any variation in the provisions of the charge or by any other thing whatsoever which under the law relating to sureties would but for this provision have the effect of so releasing the guarantors.

Clause 16 provides:

Any notice demand or request required or permitted to be made or given under this guarantee shall be in writing and shall be sufficiently made or given to the guarantors by leaving the same at or by sending it by registered post addressed to the guarantors at the addresses hereinbefore first stated or at their last known addresses and shall in such event be deemed to have been served on and duly received by the guarantors on the second day following that on which the letter containing the same is put into the post. Any such notice demand or request may be made or given to the society by leaving the same at or by sending it by registered post to the registered office of the society for the time being.

The plaintiff granted the said advances, credits and other banking facilities to the borrower and the position at the close of business on 30 September 1985 was that the moneys owed by the borrower to the plaintiff was $1,243,859.44.

In the event, the plaintiff demanded from the borrower repayment of the said sum but to no avail. Similarly, the plaintiff also demanded, by its solicitors' letter dated 29 October 1985 sent on the same day, from the guarantors payment of the said sum together with further interest at the rate of 14% pa from 1 October 1985 until payment, but again to no avail.

Although duly served with the writ of summons and statement of claim aforesaid, the first defendant entered no appearance and so on 18 March 1986 the plaintiff obtained judgment against him for the said sum and costs.

On 9 February 1988, that is to say nearly two years after judgment was entered, the first defendant took out a summons in chambers to set aside the default judgment on the following grounds:

(a) that the default judgment was not regularly obtained in that the plaintiff had entered judgment for a sum in excess of that which was lawfully due to the plaintiff;

(b) that in the alternative, if the judgment was regularly obtained he had a good defence on the merits.

As regards ground (a), it was contended by counsel for the first defendant that it was not legally permissible for the plaintiff to obtain judgment for interest at the rate of 14% pa for the post-judgment period, regard being had to the provisions of O 42 r 12 of the Rules of the High Court 1980 in the form it took prior to its amendment by PU(A) 445 dated 29 October 1986, those being the provisions in force on the date when the default judgment was obtained. My attention was drawn to the case of *MBF Finance Bhd* v *Malaysia Air Charter Company Sdn Bhd & Ors*,[1] a decision of the Supreme Court, which held that the lender was not entitled to interest in excess of 8% pa after the date of the order for sale under s 256(2) of the National Land Code 1965. In so holding, the Supreme Court treated the order for sale as a judgment within the meaning of O 42 r 12 of the Rules of the High Court which, in the form that it then took, provided that a judgment debt would carry interest at 8% pa.

I would, at this point, digress somewhat to remark that in the earlier case of *American International Assurance Co Ltd* v *Union Builders (M) Sdn Bhd*,[2] the Federal Court took a contrary view; Ong CJ speaking for the court said at p 96:

> The chargees' claim herein was not on the covenant but in exercise of their statutory remedy against a chargor in default. Hence there could not have been any merger. In this connection I might add in parenthesis that, ordinarily, a chargee hardly ever has occasion to sue on the covenant, except where the moneys realized fall short of the amount needed to satisfy his claim for principal and interest. It may also be observed that s 268 provides for priorities in the application of the proceeds of sale, first towards land rent, secondly expenses connected with the sale and then as follows:
>
> '(c) Thirdly, in the payment to the chargee of the *total amount due under the charge at the time of sale*;'
>
> The words in italics, in my opinion, further indicate that interest continues to accrue at the agreed rate until sale.

This conflict of authority would seem to have been resolved in the recent Supreme Court case of *Malaysian International Merchant Bankers Bhd* v *Dhanoa Sdn Bhd* [3] which appears to have restored, at least by necessary implication, the judgment of the Federal Court in the AIA case,[2] since it is authority for the proposition that an order for sale under s 257(1)(a) of the National Land Code is not a judgment debt within O 42 r 12, that the doctrine of merger is without application in proceedings under the National Land Code to enforce a charge and the covenanted rate of interest continues to apply until realization notwithstanding the order for sale.

I must now return to the submission of counsel for the first defendant that it was not legally permissible for the plaintiff to recover judgment for interest at the contractual rate in respect of the post-judgment period.

In the present case, the claim for post-judgment interest was based upon cl 2.05 of the charge, an independent covenant, for the payment of interest which reads:

> (a) The chargors shall pay interest on the loan or any part thereof from time to time outstanding at the rate of fourteen (14%) pa (hereinafter called 'the ruling rate',

which expression shall include such other rate as the society may from time to time by notice in writing stipulate) on monthly rests and such interest shall be paid by the chargors to the chargee by monthly payments the first of such payments to be made on the first day of the month following the disbursement of the loan or any part thereof and subsequent payments to be made on the first day of every succeeding month. Interest shall accrue and be calculated on the basis of the actual number of days elapsed.

(b) Interest on any principal moneys for the time being hereby secured including capitalized interest shall at the end of each calendar month be capitalized and added for all purposes to the principal sum then owing and shall thenceforth bear interest at the ruling rate and be secured and payable accordingly and all the covenants and conditions contained in or implied by these presents and all powers and remedies conferred by law or by these presents and all rules of law or equity in relation to the said principal sum or interest shall apply equally to such capitalized arrears of interest and to interest on such arrears.

(c) The chargee shall be entitled at any time and from time to time by notice in writing to varying at its absolute discretion the ruling rate as from the date specified in the said notice.

(d) The chargors hereby agree and confirm that the chargee shall be absolutely entitled to recover the loan in full from any end finance given to the chargors or for any project undertaken by the chargors.

Now, it is true that cl 2.05 appears in the charge but it was incorporated by reference into the guarantee agreement, see cll 1 and 13 reproduced above). Accordingly, cl 2.05 applies to the first defendant as an independent covenant.

A survey of the relevant cases on this issue shows that where the covenant for the payment of interest is not merely ancillary, but is an independent covenant, it is not extinguished in the judgment, the doctrine of merger being inapplicable, and the excess interest is recoverable in personal proceedings. There is plentiful authority to support this proposition and I need no more than refer to some of these.

In *Popple* v *Sylvester*,[4] the covenanted rate of interest was at 7% for 'so long as the principal sum or any part thereof should remain due on the security'. Fry J enforced the covenanted rate of interest, holding that the judgment did not effect a merger.

It is true that in *Re Sneyd, ex p Fewings*,[5] *Popple* [4] was distinguished on the facts, but Fry J said this:

> Of course a covenant to pay interest may be so expressed as not to merge in a judgment for the principal; for instance, if it was a covenant to pay interest so long as any part of the principal should remain due either as a covenant or on a judgment.

In recent times, in *London Borough of Ealing* v *El Isaac & Anor*,[6] Templeman LJ said this:

> I do not for myself understand how a debt payable with interest until actual repayment can be merged in a judgment without interest or with a different rate of interest payable thereafter. The merger doctrine, which was upheld by this court in *Re Sneyd* (1883) 25 Ch D 338, may be due to the fact that, in former ages, high rates of interest marked the progress of the individual on the path to perdition; whereas, in this day and age, high interest rates mark the road towards national prosperity.
>
> *Merger does not apply where there is an independent covenant nor does it apply to a security.*
> (emphasis supplied)

In *Lowry* v *Williams*,[7] the mortgagee having obtained judgment for principal and interest accrued, successfully brought a second action to recover interest at the contractual rate in respect of the post-judgment period, the court holding that there was no merger.

The following passages taken from *Fisher and Lightwood's Law of Mortgages*, 8th Ed, pp 531 and 532, fortify what Templeman LJ (as he then was) said:

> If the mortgage provides for a higher rate, the right to recover the difference between the higher rate and the judgment rate depends on the form of the covenant for payment of interest, and the nature of the proceedings – whether the claim is against the mortgagor personally, or is against the mortgaged property.
>
> Where the interest covenant is not merely ancillary, but is an independent covenant, it is not extinguished in the judgment, and the excess of interest can be recovered in personal proceedings. A covenant for payment of interest so long as any principal remains due on the security is an independent covenant, since the principal is equally due on the security whether it is owing on the covenant or the judgment. Consequently under a covenant in this form the excess interest can be recovered in personal proceedings.
>
> But in proceedings in which the mortgagee's claim is against the property, the full interest recovered by the mortgage is recoverable whether the interest covenant is independent or ancillary.

It follows, then, that there is no substance in the submission that the plaintiff had entered judgment for a sum in excess of that which was lawfully due to it.

As regards ground (b), it was contended by counsel for the first defendant, that assuming the default judgment was regularly obtained, his client had a good defence for the four separate reasons mentioned above.

In particular, it was contended that (i) the plaintiff's claim was premature in law, (ii) the plaintiff's claim was misconceived, frivolous and an abuse of the process of the court, (iii) the plaintiff's claim for interest was misconceived in law and (iv) the guarantee aforesaid was void and of no effect in that the first defendant had been induced to execute the same by misrepresentation on the part of the plaintiff that notwithstanding the terms of the guarantee, it would only have recourse to the first defendant if, but only if, it had failed to recover from the borrower the amounts outstanding upon enforcement of the charge.

In considering this part of the case, I must refer to certain well established principles which must guide the court.

In *Evans* v *Bartlam*,[8] Lord Atkin enunciated the principles with which I am now concerned thus:

> The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. It was suggested, in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

It was contended that the plaintiff's suit was premature in law because it had not been proved that service of the notice of demand dated 31 January 1985, being exh MR 8 to encl 34, addressed to 82H, Free School Road, Penang, had been effected on the first defendant.

My attention was drawn to the relevant AR card (encl 37 NR 14) which showed that it had been signed by someone on behalf of an incorporated company known as Material Handling and Engineering Sdn Bhd, of which two of the three directors were members of the family of the first defendant (see exh D1).

I regret I find this submission unacceptable. Clause 16 of the guarantee made express provision for the mode of service of notices or demands and was in the following terms:

> any notice demand or request required or permitted to be made or given under this guarantee shall be in writing and shall be sufficiently made or given to the guarantors by leaving the same at or by sending it by registered post addressed to the guarantors at *the addresses hereinbefore first stated* or at their last known addresses and shall in such event be *deemed* to have been served on and duly received by the guarantors on the second day following that on which the letter containing the same is put into the post. Any such notice demand or request may be made or given to the society by leaving the same at or by sending it by registered post to the registered office of the society for the time being. (emphasis supplied)

The 'address hereinbefore first stated' in the guarantee was 82H, Free School Road, Penang, which it will be noted, was the address to which the notice of demand was sent. By cl 16 a notice or demand sent by registered post to that address (which, incidentally, it was not disputed was the last known address of the first defendant) 'shall be *deemed* to have been served on and duly received by the guarantors on the second day following that on which the letter containing the same is put into the post'. (emphasis supplied)

Now, as Viscount Simonds said in *Barclays Bank Ltd* v *IRC*[9] when referring to the word 'deemed', 'I ... regard its primary function as to bring in something which would otherwise be excluded.'

It makes no difference that the AR card in this case bore the signature of someone ostensibly on behalf of Material Handling and Engineering Sdn Bhd. No explanation was vouchsafed to this court as to why if this individual was not authorized to receive mail on behalf of the first defendant he had signed the AR card concerned. Indeed, the first defendant had not gone on affidavit to allege that the person who signed the AR card was not authorized to receive mail on his behalf.

The submission impugning service of the notice of demand therefore fails.

In the alternative, it was submitted that the notice of demand dated 31 January 1985 was null and void having regard to the contents of the letter dated 19 February 1985 being exh B to encl 30.

The notice of demand was in the following terms:

> Mr Lim Kheng Kim
> 82-H Free School Road
> Penang
>
> Dear sir,
>
> Re: (1) Letter of guarantee dated 4 October 1982 (inter alia) signed by you in favour of Malaysia Building Society Bhd.
> (2) Memorandum of charge dated 4 October 1982 (presentation no 14145/82 jilid 250 folio 113) over holdings nos 201 and 287, town of Ayer Itam, section 1, north east district, Penang by Lim Kheng Kim Sdn Bhd in favour of Malaysia Building Society Bhd.
>
> We act for and on behalf of Malaysia Building Society Bhd, a company incorporated in Malaysia and having its registered office at no 13 Leboh Ampang, Kuala Lumpur.
>
> Our client has instructed us to refer you to the bridging loan facilities accorded to Lim Kheng Kim Sdn Bhd of no 82-H Free School Road, Penang, in respect of which as an additional security, you together with Ang Kim Hwa, Lim Hun Beng and Lim Hun Kiang executed on 4 October 1982 a joint and several guarantee wherein, inter alia, you had covenanted to pay to our client all the outstandings due from Lim Kheng Kim Sdn Bhd together with interest costs and other charges in the event Lim Kheng Kim Sdn Bhd defaults in the repayments.
>
> Despite repeated requests and demands made by our client, Lim Kheng Kim Sdn Bhd have neglected to pay the interest owing or any part thereof and had also subsequently ignored our client's demands for the repayments of all outstandings

due under the terms and conditions of the memorandum of charge dated 4 October 1982, particulars of which you are well aware of.

At the close of business on 31 January 1985, the principal sum and interest owing by Lim Kheng Kim Sdn Bhd to our client under the said charge is Malaysian ringgit two million six hundred and eleven thousand seven hundred and nineteen and cents twenty ($2,611,719.20).

We have on behalf of our client made a final demand on Lim Kheng Kim Sdn Bhd, by way of our letter dated 31 January 1985, a xerox copy of which is enclosed herewith for your attention.

Pursuant to the provisions of the guarantee mentioned above, we are instructed by our client to demand from you, as we hereby do, payment of $2,611,719.20 together with further interest at the rate of 14% pa from 1 February 1985 until payment within seven (7) days from receipt of this notice, otherwise our instructions are to proceed to, immediately thereafter, institute legal proceedings against you.

Dated 31 January 1985.

sgd
Solicitors for Malaysia Building Society Bhd No 13/15 Leboh Ampang, Kuala Lumpur

enc

cc client – Kuala Lumpur
– Penang

The letter dated 19 February 1985 (exh B to encl 30) was in the following terms:

M/s Yahaya, Suthersan & Teja
248 Market Road
Bukit Mertajam
Province Wellesley

Dear sir,

Project: Project at Lots 201 & 287 Air Itam
Subject: Bridging Loan

We wish to indicate that our Penang branch office received two cheques amounting to $111,719.20 as interest payment for the months of July 1984 to January 1985 on 12 February 1985.

The loan has been extended to 30 November 1985 subject to the existing charge and directors guarantee and subject to

(a) The repayment of the principal loan in ten monthly instalments.

(b) Interest to be serviced monthly.

(c) All legal fees to be borne by the development company.

MBSB has the right to recall the loan if at any time the development company defaults in the terms.

The first repayment is due on or by 28 February 1985.

Yours faithfully,
sgd
Controller
Operations Division

cc Branch Manager, MBSB, Penang

M/s Lim Kheng Khim Sdn Bhd
82-H Free School Road
Penang

Clearly, the letter dated 19 February 1985 was meant to grant, and did in fact grant, an indulgence to the borrowers (whose solicitors it would appear were M/s Yahaya, Suthersan & Teja) allowing it to pay the outstanding principal of $1.5 million in ten monthly instalments and interest to be serviced monthly whilst, at the same time, reserving all their rights under the charge and the guarantee. In the event, however, after making instalment payments amounting to $300,000 for the months of February and March 1985, the borrower did make default and hence a second notice of demand dated 29 October 1985 (see exh C to encl 30) was sent to the borrower and all the guarantors including, of course, the first defendant (see exh MR 9 to encl 34) simultaneously.

In the circumstances, I fail to see how it could be said that the notice of demand (exh MR 8 to encl 34) was nullified by the letter dated 19 February 1985 (exh B to encl 30), there being no inconsistency between the two.

But then counsel for the first defendant took another point. It was said that the second notice of demand dated 29 October 1985 (exh MR 9 to encl 34) addressed to the first defendant was premature and therefore bad. In particular, it was argued that the plaintiff should have given at least a seven-day notice of demand to the borrower before proceeding to make a demand upon the first defendant but the evidence was that a second notice of demand was sent to the borrower (exh C to encl 30) and all the guarantors, including the first defendant, on the same day, that is to say, on 29 October 1985.

The second notice of demand addressed to the borrower (exh C to encl 30) was in the following terms:

Lim Kheng Kim Sdn Bhd
82-H Free School Road
1160 Penang

Dear sirs,

Re: Memorandum of charge dated 4 October 1982 (presentation no 14145/82 jilid 250 folio 113) over holdings nos 201 and 287, town of Ayer Itam, section 1, north east district, Penang.

We act for and on behalf of Malaysia Building Society Bhd, a company incorporated in Malaysia and having its registered office at 11th floor, Wisma MBSB, no 48 Jalan Dungun, Damansara Heights, Kuala Lumpur, and we refer to the abovementioned charge over the abovementioned properties created by you in favour of our client to secure all sums of money due and owing to our client by you.

We are instructed by our client that despite repeated requests and demands made by our client to you, you have neglected to pay the interest outstanding or any part thereof and accordingly our client had made demands on you to repay the loan outstanding together with interest accruing thereon, which again you had ignored such requests and demands.

At the close of business on 30 September 1985, the principal sum and interest owing to our client under the said charge is Malaysian ringgit one million two hundred and forty three

thousand eight hundred and fifty nine and cents forty four ($1,243,859.44).

Take notice that if you do not pay the sum of $1,243,859.44 together with further interest at the current rate of 14% pa from 1 October 1985 till date of payment within seven (7) days from receipt of this notice, our instructions are to proceed to take the necessary steps for purposes of obtaining an order of court for the sale of the above mentioned properties.

Dated 29 October 1985.

sgd.
Solicitors for Malaysia Building Society Bhd, 11th floor, Wisma MBSB, no 48 Jalan Dungun, Damansara Heights, Kuala Lumpur

enc

cc client – Kuala Lumpur
– Penang

The second notice of demand addressed to the first defendant (exh MR 9 to encl 34) was in the following terms:

Mr Lim Kheng Kim
82-H Free School Road
Penang

Dear sir,

Re: (1) Letter of guarantee dated 4 October 1982 (inter alia) signed by you in favour of Malaysia Building Society Bhd.
(2) Memorandum of charge dated 4 October 1982 (presentation no 14145/82 jilid 250 folio 113) over holdings nos 201 and 287, town of Ayer Itam, section 1, north east district, Penang by Lim Kheng Kim Sdn Bhd in favour of Malaysia Building Society Bhd.

We act for and on behalf of Malaysia Building Society Bhd, a company incorporated in Malaysia and having its registered office at 11th floor, Wisma MBSB, no 48 Jalan Dungun, Damansara Heights, Kuala Lumpur.

Our client has instructed us to refer you to the bridging loan facilities accorded to Lim Kheng Kim Sdn Bhd of no 82-H Free School Road, Penang, in respect of which as an additional security, you together with Ang Kim Hwa, Lim Hun Beng and Lim Hun Kiang executed on 4 October 1982 a joint and several guarantee wherein, inter alia, you had covenanted to pay to our client all the outstandings due from Lim Kheng Kim Sdn Bhd together with interest costs and other charges in the event Lim Kheng Kim Sdn Bhd defaults in the repayments.

Despite repeated requests and demands made by our client, Lim Kheng Kim Sdn Bhd have neglected to pay the interest owing or any part thereof and had also subsequently ignored our client's demands for the repayment of all outstandings due under the terms and conditions of the memorandum of charge dated 4 October 1982, particulars of which you are well aware of.

At the close of business on 30 September 1985 the principal sum and interest owing by Lim Kheng Kim Sdn Bhd to our client under the said charge is Malaysian ringgit one million two hundred and forty three thousand eight hundred and fifty nine and cents forty four ($1,243,859.44).

We have on behalf of our client made a final demand on Lim Kheng Kim Sdn Bhd, by way of our letter dated 29 October 1985, a photostat copy of which is enclosed herewith for your attention.

Pursuant to the provisions of the guarantee mentioned above, we are instructed by our client to demand from you, as we hereby do, payment of $1,243,859.44 together with further interest at the rate of 14% pa from 1 October 1985 until payment within seven (7) days from receipt of this notice, otherwise our instructions are to proceed to, immediately thereafter, institute proceedings against you.

Dated 29 October 1985.

sgd
Solicitors for Malaysia Building Society Bhd, 11th floor, Wisma MBSB, no 48 Jalan Dungun, Damansara Heights, Kuala Lumpur

enc
cc client – Kuala Lumpur
– Penang

My attention was directed to the fact that although the final paragraph of the second notice of demand addressed to the borrower required payment to be made within seven days from date of receipt, so that it expired at midnight on 7 November 1985, yet the plaintiff had not waited until then before sending the second notice of demand to the first defendant.

In fact, the plaintiff had sent a second notice of demand to both the borrower and the first defendant on the same day, that is to say, on 29 October 1985. To emphasize the point, my attention was also directed to para 2 of p 2 of the second notice of demand addressed to the borrower which suggests that a seven-day notice had been given to the borrower expiring on 7 November 1985 as required under cl 16 of the guarantee.

Accordingly, it was submitted that the second notice of demand addressed to the first defendant being premature was invalid and so the plaintiff had no cause of action against the first defendant.

I regret I again find counsel's contention unacceptable for it overlooks the provisions of the guarantee which makes it clear that the liability incurred by the first defendant was as principal debtor and not merely as surety (see, eg cll 1 and 13) so that once the borrower had made default in payment of any one or more of the instalments or any part thereof or any interest thereon or any other sum of money under the charge, the plaintiff as lender, would have the right to enforce the guarantee against the guarantors for the whole amount of the outstanding loan (see cl 3(1)). The giving of seven days' notice to the borrower before the bringing of proceedings against the guarantor, assuming there was such a requirement, was mere surplusage and so was of no consequence.

For these reasons, I would also reject counsel's submission as regards this part of the case, namely that the notice of demand to be effective must have been issued after 30 November 1985, that is, the date of expiry of the bridging loan (see exh A to encl 34).

Then it was said that there was a contradiction as between the plaintiff's letter of indulgence dated 19 February 1985 (exh B to encl 30) addressed to the borrower's solicitors (reproduced above) stating that the period of the loan was extended until 30 November 1985 and its subsequent letter dated 15 March 1985 (exh MR 10 to encl 34) stating that unless the instalment payments for principal and interest were paid by 31 March 1985 action would be taken to recover the bridging loan and interest thereon.

I regard this argument too as unacceptable for it overlooks cl 3(1) of the guarantee which, as I have already noted, provides that in the event of the borrower making default in payment of any one or more of the instalments or any part thereof or any interest thereon or other sums of moneys payable under the charge, the plaintiff shall be entitled to enforce the guarantee for the whole amount of the outstanding loan inclusive of all interest and costs. Indeed, in the final paragraph of the letter of indulgence dated 19 February 1985 (exh B to encl 30) the plaintiff had reminded the first defendant of this particular obligation under the guarantee, when it stated categorically that 'MBSB has the right to recall the loan if at any one time the Development Company (the borrower) defaults in the terms'.

That concludes my examination of the various attempts by counsel for the first defendant to impugn the notices of demand.

I must next turn to consider an entirely separate point taken by counsel for the first defendant.

It was said that the plaintiff having on 12 June 1986 obtained an order for sale of the land, thus enforcing the charge being the security for the loan the subject of the guarantee, and the sale being still pending, the present suit was a useless piece of litigation, especially so since, the land concerned had been valued at $1.3 million as at 18 March 1988 whereas the default judgment was only for $1,243,559. On this basis, it was argued that only if the proceeds of sale were insufficient to meet all moneys due and owing by the borrower could recourse be had by the plaintiff to the first defendant as guarantor. To emphasize this point my attention was drawn to cl 12 of the guarantee (reproduced above) which he said operated as a condition precedent and cited the Federal Court case of *Ng Yik Seng & Anor* v *Perwira Habib Bank Malaysia Bhd.*[10]

With respect, cl 12 of the guarantee must be read not in isolation but having regard to the rest of the provisions of the guarantee. In particular, as I have already noted, the guarantors in this case had, by reason of specific provisions in the guarantee, incurred liability as principal debtors and not merely as sureties. Moreover, in the event of default being made by the borrower in the payment of any instalment of principal or interest the plaintiff, as lender, would be entitled to proceed to enforce the guarantee against the guarantors for the whole amount of the outstanding loan, interest and costs. As if to put the matter beyond doubt, the last sentence of cl 5 provides that 'the society shall not be bound or required to proceed against the security first before enforcing this guarantee against the guarantors.'

There is nothing in the judgment of the Federal Court in the *Perwira Habib Bank* case[10] to suggest that the guarantee there contained equivalent provisions and I would, on this ground, distinguish it. Moreover, I think it is common knowledge that the market conditions which prevailed at the time the *Perwira Habib Bank* case[10] was decided were poles apart from those prevailing at the present time. It was then a sellers' market whereas it is now very much a buyers' market.

If any authority is needed to support the proposition that a judge is entitled to rely on what is common and public knowledge when considering the rise or fall in the value of land, then I would refer to the following passage in the judgment of Lord Keith of Kinkel in *Datuk Jagindar Singh & Ors* v *Tara Rajaratnam:*[11]

> There can be no doubt that a judge is not entitled to use his own particular knowledge in arriving at an assessment of damages. In the general exercise of his judicial functions he is, however, entitled to rely on what is common and public knowledge. The scope of common and public knowledge may vary widely from one country to another. The fact of a fall over a period in the value of money or a rise in the value of land is a matter which is capable of being one of common and public knowledge.

In any event, in *Bank Bumiputra Malaysia Bhd* v *Esah bte Abdul Ghani,*[12] the Supreme Court had refused to follow the *Perwira Habib Bank* case.[10] Lee Hun Hoe CJ, when speaking for the Supreme Court, having referred to the relevant passage in the judgment of Chang Min Tat FJ in the *Perwira Bank* case[10] said this at p 413:

> This passage was cited and relied on by the learned judge. It is to be observed that what was stated was merely an obiter dictum. It has no bearing on the facts of that case which was concerned merely with the question whether the learned judge was right to give the appellants conditional leave to defend. The guarantor has no special right to demand that the creditor call upon the principal debtor to pay off the debt before asking the guarantor to pay. At p 207 of *Law & Practice of Banking*, Vol 2 by J Milnes Holden under para 18-12 it is clearly stated:
>
> '... it has been suggested that, as soon as the guaranteed debt has become due and before the guarantor has been asked to pay it, he has a right to require the creditor to call upon the principal debtor to pay off the debt. However, the existence of this right has been questioned.'

Lee Hun Hoe CJ then went on to refer to other authorities to support the proposition that the lender has the right to sue the guarantors without resorting to the securities; what he said was this:

The case of *Duncan, Fox & Co* v *North and South Wales Bank* (1880) LR 7 HL 348 involved certain bills discounted by the bank and indorsed by Duncan, Fox & Co and accepted by Radford & Co. Before the bills became due Radford & Co stopped payment. The bills were dishonoured, and Duncan, Fox & Co became liable to the bank. The bank held certain securities from Radford & Co. It was held that the bank should hand over the securities to Duncan, Fox & Co on payment by them of the balance remaining due to the bank. On this point, *Paget on Banking*, 8th Ed, p 618 has this to say:

'The real question was whether Duncan, Fox & Co, as indorsers, were entitled to the same rights as sureties on paying the bills; and, save for the words of Lord Watson quoted above, there is nothing in the judgments to support the proposition that a surety can decline to pay till the creditor has exhausted securities placed in his hands by the principal debtor.'

On the contrary the right to sue the guarantor without resorting to the securities is clearly recognized by Lord Selborne, and by Lord Blackburn. In the Scottish case of *Ewart* v *Latta* (1865) 4 Macq 983 at p 987, Lord Westbury C says:

'Until the debtor has discharged himself of his liability, until he has fulfilled his own contract, he has no right to dictate any terms, to prescribe any duty, or to make any demand on his creditor. The creditor must be left in possession of the whole of the remedies which the original contract gave him, and he must be left unfettered and at liberty to exhaust those remedies, and he cannot be required to put any limitation upon the course of legal action given to him by his contract by any person who is still his debtor, except upon the terms of that debt being completely satisfied.'

Accordingly, this objection also fails.

Finally, in considering an application to set aside a default judgment which has been regularly obtained, the court can quite properly take into account the conduct of the defendant apart from the question of merits.

In *Atwood* v *Chichester*,[13] a default judgment entered against a married woman was set aside about one year after it was signed but even so an objection as to lack of promptitude failed because there was no evidence of mala fides on her part, Bramwell LJ remarking at p 724:

But then has her conduct been bona fide? Has she acted merely with want of care and through ignorance, or did she really intend to suffer judgment and make herself liable upon the documents which she had signed? Upon the facts I come to the conclusion that the defendant did not intend to make herself liable in this action: she has not acted mala fide, but she has a good and meritorious defence, and the plaintiff must have known that he could not succeed.

And this is what Brett LJ, another member of the court said at p 724:

From the facts before us, I draw the inference that when she handed the writ to her husband, she did not understand its meaning, and that she did not know the consequences of suffering judgment by default. After various other proceedings, a summons is taken out to commit the defendant. Now, if it could have been shown that the object of the writ was at the time of service explained to her, she could not at this stage of the proceedings have been permitted to defend after suffering judgment by default; but she does not appear to have been informed by her husband what her position really was.

In *Ban Huat Seng Co Ltd* v *Lee Poh Soo*,[14] Ismail Khan J (as he then was) referred to *Atwood* v *Chichester* [13] and said this:

The power to set aside a regular judgment, however, is discretionary and in exercising its discretion the court may, apart from the question of merits, consider the conduct of a defendant, viz whether he has been guilty of laches in making the application and his explanation if any, as to why he neglected to appear after having been served and why he allowed the judgment to be regularly obtained (see judgment of Lord Wright in the above case). I am aware of the case of *Atwood* v *Chichester* (1878) 3 QB 722, cited as the authority for the view that lapse of time is no bar to an application to set aside a default judgment, but this proposition seems to me to be subject to this qualification, viz that the conduct of the defendant should be bona fide.

A perusal of the affidavits in this case shows that the first defendant was served personally with the writ of summons and statement of claim. He then claims that he handed over the matter to his secretary with instructions to hand over all documents to his company's lawyers to deal with the suit but that due to inadvertence and oversight on the part of his secretary he was unaware that judgment was entered against him until the time he was served with a bankruptcy notice on 7 November 1986. No confirmatory affidavit by the secretary was filed but, be that as it may, the first defendant further explained that after receipt of the bankruptcy notice he had been and still was negotiating with the directors of the plaintiff company to settle the judgment sum.

Considering that the first defendant is a seasoned businessman, it is impossible to give the slightest credence to his claim that he had left the writ of summons and the statement of claim with his secretary to pass it on to his solicitors to deal with without taking any further interest in the matter. Moreover, his attempts to negotiate a settlement with the directors of the plaintiff company and, that too, after he had received a bankruptcy notice, do nothing to help his defence that he had been induced by misrepresentation by the plaintiff to sign the guarantee.

To resume the narrative of events, following the date of entry of default judgment on 18 March 1986, the first defendant was on 7 November 1986 served personally with a bankruptcy notice and a copy of the default judgment. It was only on 23 January 1987 that the first defendant's solicitors wrote to the senior assistant registrar stating that they had instructions to accept service of the creditor's petition. Then, on 13 August 1987, when the bankruptcy petition came on for hearing, counsel for the first defendant informed the court that an application to set aside the default judgment would be

filed. However, it was not until 9 February 1988 that the first defendant bestirred himself by filing the application to set aside the default judgment.

Having regard to the chronology of events, I find that the first defendant has been guilty of laches and his conduct has not been bona fide. In all the circumstances, I had no hesitation in dismissing the application with costs.

Order accordingly.

Solicitors: *Presgrave & Matthews*; *Ooi Lee & Co.*

Reported by *PS Ranjan*

Allied Properties Sdn Bhd v Semua Holdings Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – ORIGINATING SUMMONS NO D2–31–201–87
SITI NORMA YAAKOB J
26 JULY 1988

Companies and Corporations – Rectification of register of members of company – Directors refusing to register transfer of shares – Whether refusal bona fide – Whether there was delay in communication of refusal – Whether person claiming beneficial ownership of shares was the aggrieved party – Companies Act 1965, ss 105, 131(5) & 162

The applicant had granted three loans to Malaysian Fancy Plywood and Veneer Company Ltd. As security for the loans:

(a) Ho Kong Meng Holdings ('HKM Holdings') pledged 92,000 of their shares in the first respondent, Semua Holdings Sdn Bhd ('Semua Holdings'), to the applicant, for the first loan;
(b) the fifth respondent together with Ho Hock Chye, Ho Thiam Hock, Ho Chye Thin and Ho Thiam Chiew pledged either all or part of their respective shares totalling 112,000 in Semua Holdings to the applicant for the second loan; and
(c) HKM Holdings and the fifth respondent pledged their remaining shares in Semua Holdings totalling 400,000 to the applicant for the third loan.

Pursuant to various agreements evidencing the pledging of the shares, the pledgors gave their written consent to the applicant to the registration of the pledged shares in the name of the applicant or their nominees and instructed Semua Holdings by a letter dated 25 July 1986 to register the shares in the name of the applicant's agents D & C Bank Nominees Sdn Bhd ('the nominees').

In response to the request, following a decision of its directors, Semua Holdings wrote to the nominees asking for the true identity of the beneficial owner of the shares. The nominees replied that the beneficial owner was Credit Lyonnais of Hong Kong for the account of HKM Holdings and they, the nominees, were acting for their customer only. Semua Holdings wrote asking for more particulars but before the nominees could reply, Semua Holdings had written to the nominees a letter dated 23 September 1986, informing them that the directors of Semua Holdings had unanimously rejected the nominees' request for registration. The nominees sent a second letter to Semua Holdings dated 26 September 1986 supplying all the necessary information on Credit Lyonnais and for the first time revealing that the applicant would be the ultimate beneficial owner and by the same letter they re-submitted the request for registration of the shares in the name of the applicant. That request too was rejected. Semua Holdings declined to give reasons for the decision stating that under art 23 of their articles of association they were not obliged to give reasons.

The applicant brought proceedings seeking to rectify the register of members of Semua Holdings by striking out the names of the pledgors in respect of the pledged shares and substituting the name of the applicant as the owner of the shares.

Three issues were raised at the hearing, namely:

(a) whether the applicant was the aggrieved party under s 162 of the Companies Act 1965 (the 'Act');
(b) whether Semua Holdings had delayed in communicating their decision to refuse registration; and
(c) whether the directors of Semua Holdings had exercised their discretion bona fide in refusing registration.

Held, allowing the application: (1) As the applicant was the ultimate beneficial owner there could be no doubt whatsoever that the applicant was the person aggrieved by the refusal of Semua Holdings to register the shares in the name of either the applicant or their nominees. The fact that the nominees were not a party to the action was quite immaterial to the real issue at hand which was whether the respondents had a right to refuse registration and, if so, whether that right had been properly and legally exercised.

(2) In respect of the first request for registration of the transfer, Semua Holdings had not complied with the mandatory requirement of deciding within one month on a request for registration. However, by the submission of the second request in the light of the request for information by Semua Holdings as to the true owner of the shares, both parties had waived whatever rights or obligations both had under art 23 and s 105 of the Act as regards the first request.

(3) The second request was lodged on 26 September 1986 and rejected by notice on 10 October 1986 and hence Semua Holdings were well within the statutory period of one month and to that extent the applicant's contention that Semua Holdings had failed to comply with art 23 read with s 105 of the Act was not correct.

(4) When exercising their discretion to refuse registration, the directors of Semua Holdings had to act in good faith. The third and fifth respondents were father and son respectively and the founder members of HKM Holdings, their family company. They had pledged their shares to the applicant and they must have known that what the nominees were requesting was nothing more than to enable the applicant to perfect its securities by applying to have the shares registered in their name. The third and fifth respondents were statutorily bound to disclose their personal interests in HKM Holdings as well as HKM Holdings' pledge to the applicants, interests that were also required to be disclosed under the articles of association of Semua Holdings. In failing to do so, they had clearly shown themselves to be harbouring an ulterior motive as, being the beneficial owners of the shares so pledged, they tended to gain